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9 Attorneys for BRIAN WAYNE WENDT

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

16 JONATHAN JOSEPH NELSON, et al.,

17 Defendants.
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Case No. CR-17-00533-EMC

**MOTION TO EXCLUDE OR LIMIT
THE TESTIMONY OF FBI OR
OTHER EXPERT WITNESSES
TESTIFYING ABOUT CELL PHONE
COMMUNICATIONS AND
LOCATIONS BASED ON
HISTORICAL CELL CALL DETAIL
RECORDS AND PROPRIETARY
MAPPING SOFTWARE [DAUBERT
AND F.R.E. 403]; MOTION FOR
EVIDENTIARY HEARING**

Date: March 2, 2021

Time: 9:00AM

**Dept: The Honorable Edward M. Chen
District Court Judge**

24 TO THIS HONORABLE COURT; TO COUNSEL FOR THE GOVERNMENT; TO
25 FELLOW DEFENSE COUNSEL:

26 BRIAN WENDT hereby moves for orders excluding the testimony of FBI CAST
27 team member Special Agent Meredith Sparano or any other proffered 'cell phone'
28 communication experts who are purporting to testify about a retrospective analysis of cell

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1 phone call locations based on historical cell phone records and about the mapping and
2 accuracy of mapping related to the analysis using proprietary software. The Brian Wendt
3 defense moves for an evidentiary hearing if the Court is not inclined to grant this motion
4 without a hearing. The grounds for the motion, which are set forth in detail in the
5 accompanying memorandum of points and authorities which is hereby incorporated by
6 reference, are:

7 1. Based on the contents of her CV and her declaration and disclosures, Agent
8 Sparano is not qualified to describe or establish the basis for, reliability of, or error rates
9 related to computer-generated illustrations or maps of the purported exact locations of
10 cell towers locations and handheld cell phones; the actual orientation and range of cell
11 tower antennas involved in this case;

12 2. The disclosure of Agent Sparano's materials does not satisfy F.R.C.P.
13 16(a)(1)(F) and (G) disclosure obligations as to the bases for her opinions as illustrated in
14 maps and illustrations;

15 3. Mr. Wendt objects that there is insufficient authentication (F.R.E. 901) of
16 Gladiator Forensics' ESPA software in combination with a lack of foundation that Agent
17 Sparano has the qualifications to assist in authentication to permit the admission of
18 opinion evidence that would include displaying ESPA mapping with location entries as
19 part of the CAST opinion testimony; a similar objection applies to any proposal to
20 reference peer review using Google Earth and/or CastViz;

21 4. Agent Sparano's proposed testimony does not provide information about
22 methodology and analysis based on proprietary software dependent on algorithms and
23 coding structures that have not been revealed to the defense, involve technologies found
24 by courts to not have specified error rates and have been described in court rulings and as
25 subject to variables and uncertainties not acknowledged by Agent Sparano;

26 5. In addition, Agent Sparano's opinions are not based on reliable or
27 admissible mapping of cell site and cell phone information;

28 6. The relevance of Agent Sparano's analysis is dependent on proof of the

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1 relevance and admissibility of the information about the target phones;

2 7. Because Agent Sparano is using limited data to conduct a retrospective
3 analysis of phone locations in several distinct geographical locations, her opinion
4 testimony is not the product of a reliable methodology and should be excluded;

5 8. The records employed by Agent Sparano contain hearsay; other parts of the
6 records are generated through a process that is employed primarily to prepare materials
7 for prosecution purposes and are ‘testimonial’ within the meaning of *Bullcoming v. New*
8 *Mexico*, 564 U.S. 647 (2011) and *Crawford v. Washington*, 541 U.S. 36 (2004);

9 9. The Court should exclude Agent Sparano’s opinion testimony in that its
10 potential relevance is outweighed by the substantial danger of unfair prejudice;
11 confusion; or misleading the jury within the meaning of F.R.E. 403.

12 This motion is based on the statement of the motion; on the Government’s
13 disclosures of Agent Sparano’s work, diagrams, PowerPoints, and declaration (assuming
14 that these are supplemented in areas that the defense has complained that they are
15 inadequate in); on the accompanying memorandum of points and authorities which is
16 incorporated by reference; on the appended declaration of counsel and any supporting
17 exhibits; and will further be supported by further argument and authorities as may be
18 proffered at the time of any hearing on this motion.

19 Dated: January 29, 2021

Respectfully Submitted,

20 JOHN T. PHILIPSBORN
21 MARTIN ANTONIO SABELLI

22 /s/ John T. Philipsborn
23 JOHN T. PHILIPSBORN
24 Attorneys for Brian Wayne Wendt
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1 **PROOF OF SERVICE**

2 I, Melissa Stern, declare:

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4 That I am over the age of 18, employed in the County of San Francisco,
5 California, and not a party to the within action; my business address is Suite 350, 507
6 Polk Street, San Francisco, California 94102.

7 On January 29, 2021, I served the within document entitled:

8 **MOTION TO EXCLUDE OR LIMIT THE TESTIMONY OF FBI OR**
9 **OTHER EXPERT WITNESSES TESTIFYING ABOUT CELL PHONE**
10 **COMMUNICATIONS AND LOCATIONS BASED ON HISTORICAL**
11 **CELL CALL DETAIL RECORDS AND PROPRIETARY MAPPING**
12 **SOFTWARE [DAUBERT AND F.R.E. 403]; MOTION FOR EVIDENTIARY**
13 **HEARING**

- 14 () By placing a true copy thereof enclosed in a sealed envelope with postage thereon
15 fully prepaid, in the United States Mail at San Francisco, CA, addressed as set
16 forth below;
- 17 (X) By electronically transmitting a true copy thereof through the Court's ECF system;
- 18 () By having a messenger personally deliver a true copy thereof to the person and/or
19 office of the person at the address set forth below.

20 AUSA Kevin Barry
21 AUSA Ajay Krishnamurthy
22 AUSA Lina Peng

23 All defense counsel through ECF

24 Executed this 29th day of January, 2021, at San Francisco, California.

25 Signed: /s/ Melissa Stern
26 Melissa Stern

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28 **MOTION TO EXCLUDE OR LIMIT THE TESTIMONY OF FBI OR OTHER EXPERT**
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